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No. 00-1937

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that the Commissioner has consistently construed the Social Security Act as providing disability benefits only to workers who have an impairment that has lasted or can be expected to last for the statutory time period at a level of severity that prevents substantial gainful activity. Immediately after the Act was amended in 1956 to provide disability insurance benefits, the Commissioner issued regulations specifying that a claimant is not entitled to benefits—that the then-applicable requirement of a "long-continued and indefinite duration" is not met—if "the impairment will, in the foreseeable future, be *so diminished as no longer to prevent substantial gainful activity.*" 22 Fed. Reg. 4362, 4363 (1957) (codified as 20 C.F.R. 404.1501(f) (1960 Supp.)) (emphasis added). As the Commissioner's contemporaneous instructions to the States explained, the "long-continued and indefinite duration" requirement refers to the "expected duration of the medical impairment" at a "level of severity sufficient to preclude SGA." OASI Disability Insurance Letter No. 39 (Pt. V of Disability Insurance State Manual), at 1 (Jan. 22, 1957).

When Congress changed the duration requirement to "not less than 12 months" in 1965, the Commissioner adhered to that construction, explaining that the requirement is not met unless the impairment "is expected to last at a disabling level for 12 months or more from onset." SSA Disability Insurance Letter No. III-6 (Pt. III of Disability Insurance State Manual), at 4 (Nov. 19, 1965); see Disability Insurance State Manual, § 316 (Sept. 9, 1965) ("Duration of impairment refers t. that period of time during which an individual is continuously unable to engage in substantial gainful activity because of [the] impairment."). See also SSR 73-7c, at 122 (Cum. Ed. 1971-1975) ("both the 'inability to engage in any substantial gainful activity' and the 'impairment' must exist

at the same time and for the required 12-month period"); 20 C.F.R. 404.1520(b), 404.1520(f) (2000) (claimant who engages in substantial gainful activity is "not disabled regardless of [his] medical condition"); Gov't Br. 24-27.

Congress also has long understood that the impairment must be of disabling severity for the full 12-month period. See Gov't Br. 20-21, 33-38. When Congress changed the duration requirement in 1965, the Senate Report explained that the amendment would provide "for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled* throughout a continuous period *of 12 calendar months*." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 98-99 (1965) (emphasis added). When Congress later provided supplemental security income (SSI) for the disabled poor, it again made clear that "[n]o benefit is payable * * * unless the *disability* is expected to last (or has lasted) at least 12 consecutive months." H.R. Rep. No. 231, 92d Cong., 1st Sess. 56 (1971) (emphasis added).

Respondent nevertheless insists (Br. 4) that the "clear and unambiguous" text of the Act requires the payment of benefits whenever the impairment—the mere physical or mental condition—has lasted or can be expected to last 12 months, even if it is not severe enough to prevent substantial gainful activity for much of that time. In his view, no "duration requirement for the inability to engage in substantial gainful activity * * * exists." Resp. Br. 6 (quoting Pet. App. 7a). The Commissioner, however, has reasonably read the twin definitions of disability in 42 U.S.C. 423(d)(1)(A) and (d)(2) to require not only an impairment, but an impairment so severe that it precludes the claimant from engaging in any substantial gainful activity. Those provisions nowhere suggest (much less unambiguously state) that the severity requirement is met so long as the impairment is of disabling severity for a mere moment. Respondent's position also cannot be reconciled with decades of appellate precedent,

and with the purpose of the disability program, which was to provide benefits for workers "forced into premature retirement" before age 65 "by reason of a *permanent and total* disability," not to provide compensation for workers suffering from short-term disabilities. H.R. Rep. No. 1189, 84th Cong., 1st Sess. 3 (1955) (emphasis added).

Respondent's construction, moreover, would fundamentally alter the nature of the Social Security program, eliminating a requirement the Commissioner has applied in resolving tens of millions of claims over 45 years. It would radically broaden the number of individuals entitled to benefits, creating an $8 billion annual burden. Pet. 18. And it would create a system that is exceedingly difficult to administer. Under respondent's approach, a claimant who is prevented from working for a short period by, for example, a virus or other chronic condition, would be entitled to SSI benefits under Title XVI if the condition, in a medical sense, persisted or is expected to persist in his body for a year. Thereafter, the Commissioner would have to find cause for and terminate benefits. Respondent nowhere explains why Congress would have sought to impose that burden on an agency that already processes over 2 million new claims a year. Further, although respondent relies on the policy of encouraging claimants to return to employment as soon as possible, his proposed construction would undermine that incentive by mandating the payment of benefits not merely to workers who return to their jobs, but also to workers who can return to work but do not do so.

I. THE AGENCY'S CONSTRUCTION IS CONSISTENT WITH THE ACT'S DEFINITION OF "DISABILITY"

A. The Text And History Of The Act Support The Commissioner's Construction

Respondent does not dispute that, if the Act is silent or ambiguous with respect to the precise question at issue here, the Commissioner's construction must be sustained so long

as it is reasonable. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 (1984); Gov't Br. 22-23. Rather, respondent argues that the text of the Act forecloses the Commissioner's interpretation. Respondent reasons (Br. 8) that, because the 12-month duration requirement in Section 423(d)(1)(A) unambiguously applies to the impairment, the statute necessarily *precludes* application of a corresponding 12-month duration requirement to the inability to engage in substantial gainful activity.

1. Respondent's textual argument begins (Br. 6-10) by ignoring critical features of the definition of "disability." Section 423(d)(1)(A) does require that the impairment last or be expected to last 12 months. But the text of Section 423(d)(1) does not unambiguously resolve the level of severity at which the impairment must persist during that time period. Consistent with the statutory goal of providing *disability* benefits rather than *impairment* benefits, the Commissioner has consistently interpreted the Act as requiring the impairment to persist at a disabling level of severity—that the impairment have been or be expected to be so severe as to preclude substantial gainful activity —throughout the 12-month qualifying period. See pp. 1-2, *supra*; Gov't Br. 20-21, 24-27 & n.7.[1]

That construction is supported by two features of the Act. The first is Section 423(d)(2)(A), which clarifies the definition

[1] That construction is embodied not merely in Social Security Rulings, but also in the Commissioner's recent notice-and-comment rulemaking, which explains that "the duration requirement to establish disability will not be met" if the "impairment no longer prevents substantial gainful activity" before the 12-month period has lapsed. 65 Fed. Reg. 42,772, 42,774 (2000); 60 Fed. Reg. 12,166, 12,168 (1995) (proposing construction). Contrary to respondent's contention (Br. 21, 27 n.6), deference is warranted even where the rulemaking is completed after the case has commenced. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996); *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984). The construction, furthermore, was applied in the adjudication of respondent's claim by the ALJ (Pet. App. 40a-41a) and the Appeals Council (Pet. App. 47a-48a).

of disability by specifying that a claimant is not disabled unless the impairment is "of such severity" that the claimant can neither "do his previous work" nor "engage in any other kind of substantial gainful work which exists in the national economy." That provision is naturally read as clarifying the scope of the severity requirement applicable to all relevant time periods—including the 12-month period during which the impairment must have lasted or be expected to last. Second, Section 423(d)(1)(A) itself expressly links the impairment and the inability to engage in substantial gainful activity. Under Section 423(d)(1)(A), it is not enough for a claimant to show an "impairment" of the specified duration. Instead, the claimant must suffer an "inability to engage in any substantial gainful activity *by reason of*" that impairment. Accordingly, it is reasonable for the Commissioner to construe Section 423(d)(1) as requiring that the claimant have an impairment that prevents (or is expected to prevent) substantial gainful activity for the requisite period. That is particularly true given the absurd consequences the contrary construction would yield. As we have noted (Gov't Br. 5, 40) and respondent does not dispute, Title XVI does not provide any "waiting period." Thus, under respondent's construction, a claimant who is prevented from working for a short period by, for example, hypertension, would be entitled to SSI benefits under Title XVI if that condition, in a medical sense, persisted for a year thereafter even if it did not affect his ability to work. There is no evidence that Congress contemplated such a result.

For similar reasons, respondent errs in asserting that the Commissioner's construction is precluded by the maxim that "a definition which declares what a term 'means' excludes any meaning that is not stated." Resp. Br. 12 (quoting *Colautti* v. *Franklin*, 439 U.S. 379, 392-393 n.10 (1979)). There is no need to refer to a "meaning" of disability other than the statutory definitions contained in Section 423(d)(1)(A) and

(d)(2)(A); nor is there any need to insert "additional language," Resp. Br. 8, or a "criterion" extraneous to those definitions, *id.* at 11-12. The severity requirement on which the Commissioner relies—the rule that the impairment must be so severe as to preclude substantial gainful activity—is set forth in Section 423(d)(1)(A) and (d)(2)(A). The only question is whether, consistent with the Commissioner's longstanding construction, the impairment must be of disabling severity throughout the 12-month period.

Deferring to the Commissioner's longstanding construction thus does no violence to the statutory text or Congress's intent. To the contrary, only the Commissioner's construction properly implements Congress's intent that benefits be paid only if the claimant is "totally disabled" for at least "12 calendar months." S. Rep. No. 404, *supra*, at 99; H.R. Rep. No. 231, *supra*, at 56.[2] Even respondent's amici agree with the Commissioner's construction: "There is no dispute," they explain, "that if the impairment is (or is expected to be) of *less than* disabling level severity for 12 months then the applicant cannot qualify for benefits." Br. AARP 13.[3]

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[2] Respondent errs in relying on the Commissioner's regulations to support his contrary construction. See Resp. Br. 20-21. The cited regulations do show that the *impairment* must have lasted or be expected to last at least 12 months. But, like the Act itself, they nowhere suggest that the impairment need not have lasted or be expected to last that long at the requisite level of severity, as the Commissioner has long required. Pp. 1-2, *supra*. The Commissioner's construction of her own regulations, of course, "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Similarly, respondent errs in claiming (Br. 8 n.2) that the "by reason of" language in Section 423(d)(1)(A) merely requires that the inability to work "result primarily from a medical impairment, not from economic conditions." It certainly has that effect. But it also requires a direct link between the underlying impairment and the resulting disability.

[3] Respondent now makes the case-specific argument that he has met the severity requirement because his impairment is "listed" as being "severe enough to prevent a person from doing any gainful activity." Resp. Br. 11 (quoting 20 C.F.R. 404.1525(a)) (emphasis omitted). That assertion is a red-herring. The Commissioner uses "listings" to simplify a *portion* of the severity determination; if an impairment is listed or is equivalent to a listed impairment, it is presumed to be sufficiently severe so long as other requirements (including durations) are met. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999). Thus, if the claimant's impairment has ceased to prevent substantial gainful activity before the expiration of 12 months, the claim must be denied, whether or not the impairment is listed. See, *e.g.*, 20 C.F.R. 404.1520(b) (claimant engaged in "substantial gainful activity" will be found "not disabled" at first step, "*regardless of [his] medical condition*" (emphasis added)); S. Rep. No. 408, 96th Cong., 1st Sess. 45 (1979) (disability generally determined "not by medical severity, but rather * * * in terms of incapacity for significant employment—substantial gainful activity.").

2. Respondent asserts (Br. 13-14) that the courts "have determined that the statutory language is so clear that the agency's interpretation is not entitled to deference." That assertion is also incorrect.

As an initial matter, respondent erroneously conflates the two questions presented in this case. The cases on which respondent relies (Br. 13-14) generally do not address whether the impairment must have lasted or be expected to last *at a disabling level of severity* for the 12-month period to satisfy 42 U.S.C. 423(d)(1) and (d)(2), which is the first question presented. They address whether the *trial work* rules embodied in SSR 82-52 (and 20 C.F.R. 404.1592) are consistent with 42 U.S.C. 422(c), which is the second question presented. See pp. 15-20, *infra*. Relying on the "can be expected to last" component of the definition of disability, those cases hold that a claimant may be entitled to a trial work period if, at some point in the past, the disability *was* expected to last 12 months, even though that expectation later proved to be erroneous. See *McDonald* v. *Bowen*, 818 F.2d 559, 563 (7th Cir. 1986) (Resp. Br. 22); *Salamalekis* v. *Commissioner*, 221 F.3d 828, 822 (6th Cir. 2000) (Resp. Br. 14, 23). Although that reasoning is mistaken (pp. 16-17, 19-20, *infra*); neither *McDonald* nor *Salamalekis* casts doubt

on the Commissioner's rule that the impairment must have been (or be expected to be) of disabling severity *throughout* the 12-month period. To the contrary, *McDonald* holds that a claimant will receive benefits only if her "*disability* is still expected to last at least twelve continuous months" when she returns to work; "otherwise she will not receive benefits." 818 F.2d at 564 (emphasis added). Similarly, *Salamalekis* nowhere purports to overturn the Sixth Circuit's earlier decision in *Sierakowski* v. *Weinberger*, 504 F.2d 831 (1974) (per curiam), where the court held that the claimant's "[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated," and that those "two components of disability must exist at the same time." *Id.* at 833 & n.1.[4]

In fact, the appellate decisions that do address the relationship between the 12-month duration requirement and the severity requirement fatally undermine respondent's position. The first appellate decision to address this issue, *Alexander* v. *Richardson*, 451 F.2d 1185, 1186 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972), specifically rejected respondent's construction, concluding instead that both

[4] The remaining decisions cited by respondent (Br. 13-14) similarly address the trial work period, not whether the impairment must be of disabling severity during the 12-month period. See, *e.g.*, *Fabel* v. *Shalala*, 891 F. Supp. 202, 206 (D.N.J. 1995) (Resp. Br. 14); *Jenkins* v. *Heckler*, 783 F. Supp. 998, 1000-1001 (D. S.C. 1992) (Resp. Br. 23). See also notes 5-6, *infra*. In *Singletary* v. *Bowen*, 798 F.2d 818 (5th Cir. 1986) (Resp. Br. 22), the court did distinguish between the impairment and severity requirements, but it ultimately concluded that the severity requirement had been met throughout the 12-month period because the claimant could not "obtain *and maintain* employment." *Id.* at 823. Here, in contrast, respondent successfully held a job for two years before being dismissed for selling alcohol to minors. Moreover, after *Singletary* was decided, the Fifth Circuit repeatedly reaffirmed the rule that "an impairment must be disabling for a twelve month period" and distinguished *Singletary* as creating an "exception" for mental illnesses that permit intermittent work but prevent claimants from retaining their jobs. *Johnson* v. *Bowen*, 864 F.2d 340, 346 (1988); *Neal* v. *Bowen*, 829 F.2d 528, 531 n.2 (1987).

"components of disability"—the impairment and the resulting inability to work—"must exist at the same time." The Sixth Circuit adopted that construction in *Sierakowski* in 1974, and the Eighth Circuit adopted it in *Titus* v. *Sullivan*, 4 F.3d 590, 594 (1993). Other courts have endorsed that construction as well. See *Estep* v. *Richardson*, 459 F.2d 1015, 1016 (4th Cir. 1972) ("claimant must have an impairment which prevents him from engaging in substantial gainful activity for a period of at least 12 months")[5]; *Johnson* v. *Bowen*, 864 F.2d 340, 346 (5th Cir. 1988) (per curiam) (the "impairment must be disabling for a twelve month period"); *McDonald*, 818 F.2d at 564. The decision in this case thus represents a sharp departure from the longstanding judicial interpretation of the Act, as well as from the Commissioner's longstanding interpretation.[6]

3. To the extent there can be doubt concerning the reasonableness of the Commissioner's construction, Congress's repeated amendments to the Act eliminate it. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence

[5] Although respondent attempts to distinguish *Estep* as a case in which the *impairment* did not last a year, that misreads *Estep*. There, the court of appeals upheld the denial of benefits because the claimant could "*work* as early as March 3, 1969," 459 F.2d at 1016 (emphasis added), *i.e.*, because the impairment had ceased to be *disabling* before the end of 12 months. Indeed, the impairment itself persisted for more than 12 months; "residuals" of the injury continued to give the claimant "trouble" and made it difficult to bend or stoop years later. *Ibid.*

[6] Respondent errs in asserting (Br. 24-25) that *Walker* v. *Secretary of HHS*, 943 F.2d 1257, 1260 (10th Cir 1991), and *Newton* v. *Chater*, 92 F.3d 688 (8th Cir. 1996), "effectively" overruled *Alexander* and *Titus*. *Walker* and *Newton* addressed the Commissioner's trial work regulations, not whether the impairment must have been or be expected to be of disabling severity for the requisite duration. See Gov't Reply Br. Cert. Stage at 2-3.

that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986).

Respondent does not dispute that Congress made repeated amendments "over the years without changing the Commissioner's construction." Resp. Br. 17-18 n.4. Nor does respondent deny that Congress, while amending the Act, reaffirmed that construction. See p. 2, *supra*; Gov't Br. 33-38. Thus, respondent ignores the fact that Congress, while changing the duration requirement from "long-continued and indefinite" to "not less than 12 calendar months" in 1965, acknowledged that prior law had precluded the payment of benefits unless "the worker's *disability*"—*i.e.*, his inability to engage in substantial gainful activity by reason of the impairment—"is expected * * * to be of long-continued and indefinite duration." H.R. Rep. No. 213, 89th Cong., 1st Sess. 88 (1965) (emphasis added). Respondent ignores the Senate Report's explanation that the Act, as amended, would make an insured worker "eligible for disability benefits if he has been *under a disability* which * * * has lasted or can be expected to last for a continuous period of *not less than 12 calendar months*." S. Rep. No. 404, *supra*, at 13 (emphasis added). See also *id.* at 98-99 (quoted p. 2, *supra*). And he ignores the reason Congress chose to impose a 12-month duration requirement—because "in the great majority of cases in which *total disability* continues for at least a year the *disability* is essentially permanent." *Id.* at 99 (emphasis added). Respondent also makes no attempt to address the similar statements in the House and Senate Reports accompanying the 1967 and 1972 amendments. See p. 2, *supra*; Gov't Br. 37-38.

Respondent nonetheless asserts (Br. 18 n.4) that the Commissioner's construction was not well settled when Congress amended the Act, because it was "at odds with judicial interpretations." Respondent is mistaken. Respondent cites (and we have found) no case preceding or contemporaneous to the 1965 and 1967 amendments disagreeing with the Commissioner's construction. Moreover, when Congress amended the statute in 1972, two courts of appeals —the 10th Circuit in *Alexander* and the Fourth Circuit in *Estep*—had concluded that both the impairment and the resulting inability to work must have lasted or be expected to last the 12-month period. See pp. 8-9, & nn. 4-6, *supra*.

In fact, respondent cites nothing from the legislative history of the 1965, 1967, or 1972 amendments that contradicts the Commissioner's construction.[7] Nor does respondent cite anything from the history of the 1956 amendments that created the disability insurance benefit program. Instead, respondent relies (Br. 15-16) on the legislative history of certain *1954* amendments. Those amendments, however, created a *different* program—the "disability freeze" program (see 42 U.S.C. 416(f))—two years before Congress created the disability insurance benefit program at issue here. See Gov't Br. 33-34. Even that legislative history for the most part supports the Commissioner's construction. *Ibid.* Moreover, as we pointed out (and respondent does not dispute), the second of the statements quoted by respondent was largely without significance even for the disability freeze program to which it referred. Gov't Br. 35 n.11. And the first of the statements he quotes (Resp. Br. 16) referred to a distinctive feature of the disability freeze provision that was not present in the disability

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[7] Respondent identifies portions of the legislative history indicating that the *impairment* must have lasted or be expected to last 12 months. See Resp. Br. 17. But that proves nothing. No one disputes that the impairment must be of the specified duration. The only question is whether the impairment must have lasted or be expected to last that long at a *disabling level of severity*. As the House and Senate Reports demonstrate, Congress clearly understood that the answer to that question is "yes"—that the worker must be "totally disabled throughout a continuous period of 12 calendar months" because of the impairment. See S. Rep. No. 404, *supra*, at 99.

insurance program enacted two years later.[8] In any event, the statements quoted by respondent furnish no basis for adopting respondent's vision of the disability insurance program 45 years after it was established. That is particularly so because Congress understood, when it created the disability insurance benefits program in 1956, that a worker would receive benefits only if his "disability"—defined as the inability to work on account of an impairment—was of "long-continued and indefinite" duration (H.R. Rep. No. 1189, *supra*, at 5), and it since has repeatedly expressed that understanding, pp. 1-2, 10, *supra*.

B. Respondent's Construction Would Convert The Act Into A Short-Term Disability Program and Undermine Work Incentives

1. Respondent's claim that he is entitled to benefits merely because his underlying medical condition lasted at least a year—even though it did not preclude him from successfully returning to work during that period—is also impossible to reconcile with the purpose of the disability programs. Congress established these programs to protect workers who were "forced into premature retirement" before age 65 "by reason of a permanent and total disability," not to provide payments to workers who are only briefly prevented from working by a long-term medical condition. H.R. Rep. No. 1189, *supra*, at 3. Congress, moreover, rejected proposals in 1965 to provide benefits to individuals who were disabled for just six months, finding it "necessary

[8] The disability freeze program specified that the "term 'period of disability' means a continuous period of not less than six full calender months * * * during which an individual was under a disability * * *." Social Security Amendments of 1954, ch. 1206, § 106(d), 68 Stat. 1080; see 42 U.S.C. 416(i)(2)(A) (now providing that "period of disability" must be "at least 5 months"). A "period of disability" ended under the 1954 program not only when the disability ceased, but also when the individual reached retirement age. 1954 Amendments, § 106(d) (adding 42 U.S.C. 416(i)(2)); accord 42 U.S.C. 416(i)(2)(D) (1994).

to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." S. Rep. No. 404, *supra*, at 98 (emphasis added). Respondent's construction of the Act would contravene that deliberate choice. Under it, claimants would receive Title II insurance benefits if they are unable to work for only five months (the duration of the waiting period provided by 42 U.S.C. 423(c)(2)(A)). Moreover, because Title XVI does not have a waiting period, the Commissioner would be required to process claims for and pay Title XVI SSI disability benefits to claimants who have chronic impairments and suffer an inability to engage in substantial gainful activity of virtually *any* duration. Recognizing as much, respondent all but abandons his former suggestion (Br. in Opp. 11, 17-18) that the five-month waiting period establishes a *de facto* duration requirement for the inability to work. Gov't Br. 40-42.

Nonetheless, respondent argues (Br. 26) that his construction would generally prevent the payment of benefits for short-term disabilities because, he asserts, some impairments of long-term duration will "never [be] so severe as to prevent" substantial gainful activity, while other impairments that are sufficiently severe at the outset will not last the full 12-month period. Those contentions ignore the huge number of impairments—medically determinable defects in the normal functioning of the body such as carpal tunnel syndrome, back injuries, viral infections, and even the hypertension respondent mentions—that often last indefinitely but generally prevent workers from engaging in substantial gainful activity, if at all, only briefly or intermittently. See Gov't Br. 28-29. Under respondent's construction, each of those common ailments would become a compensable disability under Title XVI if it prevents the claimant from working for virtually any period of time, however brief, and under Title II if it prevents work for just

five months—whether or not the claimant later goes back to work. Thus, far from barring the payment of benefits for short-term disabilities, respondent's construction would mandate that result in a vast number of cases. Respondent points to no indication that Congress intended to impose either the resulting $8 billion per-year cost of paying those claims, or the enormous administrative burden of processing them, on an agency that already processes two million claims a year. See Pet. 18-19.

2. Ultimately, respondent's fundamental contention—and the theme underlying his submission—is that Section 423(d) should be read to link the duration requirement to the impairment, but not to the inability to work, to give claimants an incentive to return to work notwithstanding their impairments. That argument, however, once again conflates the two questions presented. Congress addressed the incentive for disabled individuals to return to work through the trial work provisions of Title II (42 U.S.C. 422), and the work incentive program in Title XVI (42 U.S.C. 1382h), as well as the recently established Ticket to Work and Self Sufficiency Program (42 U.S.C. 425(e), 1320b-19, 1383(a)(6) (Supp. IV 1999). See also p. 19, *infra* (regulations relating to unsuccessful work attempts). Moreover, under the Commissioner's construction, a claimant who has not yet been adjudicated disabled *already* has a strong incentive to return to work, because there is no guarantee that the Commissioner will award him benefits, especially if he becomes able to work before benefits are awarded.

Finally, contrary to respondent's repeated suggestion, his construction would not merely establish a narrow exception to the 12-month duration requirement that is limited to those claimants who actually return to work despite an impairment. Rather, it would require the payment of benefits to millions of claimants who, having suffered a short-term disability by reason of a chronic impairment, can but do not

return to work within 12 months of the disability's onset. And it would be the Commissioner's burden to *continue* paying benefits or to find justification and initiate proceedings to terminate them. See, *e.g.*, 42 U.S.C. 423(f)(1) (termination of benefits permitted if "the individual is now able to engage in substantial gainful activity" because "there has been any medical improvement in the individual's impairment"). Respondent thus envisions a program that would be virtually impossible to administer—a program that creates an enormous number of entitlements for short-term disabilities and then places the burden of terminating payments on an agency that already processes two million claims a year. For similar reasons, respondent's construction in fact would create an enormous *disincentive* to working. Under it, millions of additional individuals would become eligible for benefits even though they are disabled only briefly; they would receive benefits for a period of time during which they could work; and they would continue to receive those benefits until the Commissioner managed to terminate them.

II. RESPONDENT IS NOT ENTITLED TO A TRIAL WORK PERIOD BECAUSE HE NEVER BECAME ENTITLED TO BENEFITS

Alternatively, respondent argues that neither his ability to work nor his actual return to work within 12 months of the onset of his alleged disability should preclude him from receiving benefits because, he claims, he was entitled to a nine-month trial work period under 42 U.S.C. 422(c). As respondent concedes, the trial work period begins "with the month in which [the claimant] *becomes entitled* to disability insurance benefits." Resp. Br. 27 (emphasis added) (quoting 42 U.S.C. 422(c)(3)). Respondent, however, never became entitled to benefits. And where the claimant never

"becomes entitled" to benefits, under the plain text of Section 422(c)(3), the trial work never "begin[s]."[9]

A. Respondent essentially ignores that construction of the Act, which was explained in detail in the Commissioner's recent rulemaking and resulting regulations (20 C.F.R. 404.1592(d)(2); 65 Fed. Reg. at 42,774, 42,780), and in our opening brief (at 44-46, 47-48). Instead, respondent asserts that an individual is entitled to benefits, and a trial work period, if his impairment "was still expected to last" 12 months as of "the date of application." Resp. Br. 31, 32. Thus, respondent asserts, he became "entitled" to benefits, and to a trial work period, after five months of disability because, when he applied for benefits, his impairment "*was* * * * expected" to be disabling for at least 12 months. That is true, he claims, even though the disability had not lasted and could not be expected to last 12 months when his claim was actually adjudicated. *Id.* at 32.

That contention is contradicted by the Act's text. See Gov't Br. 45 n.14. Section 423(d)(1)(A) does not provide that an applicant is entitled to benefits if his disabling impairment *was* expected to last 12 months at some point in the past. Instead, an applicant is entitled to benefits if the impairment precluding substantial gainful activity "*has* lasted or *can be* expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A) (emphasis added). Because Section 423(d)(1)(A) uses the present tense in describing expected duration—"*can be* expected to last"—it is "most reasonably * * * interpreted to mean that the time of *adjudication* is the relevant point of reference." 65 Fed.

[9] If respondent had been found entitled to benefits, the Commissioner would have calculated the beginning date for his entitlement; the trial work period would then be deemed to have begun in the first month of work activity following that date. Because the Commissioner concluded that respondent was not entitled to benefits, however, there was no "first month" of entitlement. See 65 Fed. Reg. at 42,781.

Reg. at 42,780 (emphasis added). Consequently, if the claimant's disability has not already lasted and cannot be expected to last for 12 months when the adjudication takes place, the claimant is not entitled to benefits and is not entitled to a trial work period. "If Congress had intended benefits" and a trial work period "to be awarded based on evidence that a claimant's impairment(s) did not in fact prevent substantial gainful activity for 12 continuous months, but only had been expected to do so at some earlier point in the 12-month period, we believe that Congress would have provided for a finding of disability based on an impairment(s) which *was* expected to last 12 months, in addition to one which *can be* expected to last 12 months." *Ibid.*

Respondent asserts (Br. 31-32) that the Commissioner's construction eliminates the "can be expected to last" language from the Act, or "reads into it a 12-month waiting period" in place of the five-month waiting period established by Congress. Neither assertion is correct. Where the claim for benefits is adjudicated within 12 months of filing—as is often the case—the claimant will be entitled to benefits even if his disabling impairment has not already lasted 12 months, *if* the decisionmaker finds that it "can be expected to last" that long. The Commissioner's construction thus gives full effect to the present-tense meaning of the phrase "can be expected to last." Nor does the Commissioner's construction replace the five-month waiting period under Title II with a 12-month waiting period. Disability benefit claims under Title II can be processed within five months of the alleged disability's onset, and such claims can be (and often are) paid after the fifth month following the onset date *if* the adjudicator determines that inability to work can be expected to last at least 12 months. Gov't Br. 41-42.

B. Respondent also argues that the Commissioner's construction is "unfair" and "arbitrary" because, in some cases, the entitlement to benefits might depend on when the claim

is adjudicated. Resp. Br. 32-33, 40-41. As the Commissioner pointed out, however, that is an inevitable consequence of permitting the Commissioner "to adjudicate disability claims and award benefits without having to wait 12 months from onset," because the Commissioner necessarily must rely on potentially faulty predictions about the disabling impairment's duration. See 65 Fed. Reg. at 42,780. Some claimants may be awarded benefits (and trial work periods) because the Commissioner makes a reasonable but mistaken projection that the disabling impairment will last 12 months. But that hardly compels the conclusion that the Commissioner must award benefits to claimants whenever, if she had adjudicated their claims earlier, she would have made such a mistake. In other legal contexts, evidence that develops after the claim is filed, but before adjudication, is routinely considered admissible and probative. That is true even if that evidence would not have been available—and the outcome therefore might have been different—had the adjudication occurred earlier. See Gov't Br. 49-50.

C. Respondent's reliance on policy and the Act's legislative history (Br. 33-37) is also unavailing. The materials cited by respondent do show that Congress, by establishing trial work periods, sought to encourage disabled beneficiaries who are entitled to benefits to return to work notwithstanding their receipt of benefits. But those materials do not suggest that a claimant becomes entitled to benefits and a trial work period if, at the time his claim is adjudicated, his impairment no longer prevents substantial gainful activity and never did so for 12 continuous months, merely because it might reasonably (but erroneously) have been predicted to last 12 months in the past. The Senate Report accompanying the 1965 amendments in fact contradicts respondent's suggestion. Gov't Br. 46-47.

More fundamentally, respondent's proposed construction does not create—and in fact undermines—the incentive to

return to work on which he relies. Under respondent's view, the fact that the claimant's inability to engage in substantial gainful activity was reasonably but mistakenly expected to last 12 months at the time of application is sufficient to require an award of benefits. That is true not only for the claimant who returns to work within 12 months, but also for the claimant who becomes able to work but chooses not to; the past expectation of a 12-month duration, when the claim was filed, would be sufficient to create entitlement. Respondent's construction thus would award benefits to individuals who are able to work but choose not to do so.

Nor is respondent correct in asserting that the Commissioner's rules deter insured workers from attempting to return to work. Under the Commissioner's rules, any attempt to return to work that is unsuccessful—such as an attempt that lasts less than 3 months—will not preclude the applicant from receiving benefits. See 65 Fed. Reg. at 42,780; 20 C.F.R. 404.1574(c), 404.1575(d) (2001); Gov't Br. 27 n.8. Those regulations offer significant protection for genuinely disabled individuals who make an effort to overcome their circumstances within 12 months of the alleged disability's onset. The regulations do not afford benefits to claimants who can successfully return to work within 12 months of the alleged disability's onset (whether they actually return to work or not). But such claimants are not precluded from working by their impairments—they are not disabled—and have not suffered the sort of long-term disability Congress required. They therefore have no reason to demand disability benefits on top of the earnings they could or do derive from their substantial gainful activity.

D. Finally, respondent notes (Br. 37-40) that a number of courts have rejected the Commissioner's construction of the trial work rules. The decisions respondent cites, however, commit the same error as respondent and the decision below. Ignoring Congress's use of the present tense—"can be

expected to last"—in Section 423(d)(1)(A), those courts have read the Act as entitling a claimant to benefits and a trial work period if the impairment *was* expected to last 12 months when the claimant returned (or became able to return) to work. See *e.g.*, *Salamalekis*, 221 F.3d at 832; *McDonald*, 818 F.2d at 564. Like respondent, however, none of those decisions attempted to reconcile that construction with the Act's text, which requires a disability that *can* be expected to last the requisite period, not one that reasonably *was* expected to last that long at some point in the past.

Moreover, just as respondent does not explain why expected duration should be determined as of the date of the *application*, those decisions fail to explain why expected duration should be determined as of the date of the claimant's *return to work*. The reason for those omissions is clear: The Act, most naturally read, requires the expected duration of the disability to be determined in view of the evidence available when the claim is adjudicated, not at some (unspecified) point in the past. But even if the statute were "ambiguous" or "silent on the matter of time," the Commissioner's reasonable construction must be sustained. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 458 (1998). Nothing in the statute or its history requires the Commissioner to make determinations regarding expected duration based on what might have been *thought* to be true at some point in the past and to ignore evidence showing that the claimant already returned to work or could do so.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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